Nos. 85-1239 and 85-1406

In The

Supreme Court of the United States

October Term, 1986

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AMOCO PRODUCTION COMPANY, *et al.*,
Petitioners,

v.

PEOPLE OF THE VILLAGE OF GAMBELL, *et al.*,
Respondents.

DONALD P. HODEL SECRETARY
OF THE INTERIOR, *et al.*,
Petitioners,

v.

PEOPLE OF THE VILLAGE OF GAMBELL, *et al.*,
Respondents.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF AMICI CURIAE IN SUPPORT OF RESPONDENTS

STATE OF CALIFORNIA EX REL. JOHN K. VAN DE KAMP, ATTORNEY GENERAL, AND THE STATES OF ALASKA, DELAWARE, FLORIDA, HAWAII, KANSAS, NEW MEXICO, OKLAHOMA, SOUTH CAROLINA, TEXAS, VIRGINIA, AND WISCONSIN

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QUESTION PRESENTED

Does the Ninth Circuit's standard for issuance of an injunction for substantial violation of Alaska National Interest Lands Conservation Act section 810 properly reflect Congress's determination to protect subsistence uses and its creation of a single mechanism to provide for subsistence use protection?

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Amici respectfully submit this brief pursuant to Rule 36.4 of the Rules of the United States Supreme Court, in support of respondent, People of the Village of Gambell.

INTERESTS OF AMICI

The states which have joined as amici in this brief share a deep and abiding concern for the continued diligent

enforcement of environmental statutes. Injunctive relief, as a remedy to statutory violation and as tool to maintain the status quo pending final judicial determination, forms a pivotal element of environmental enforcement, both in obtaining full statutory compliance and in achieving deterance.

Amici believe that this litigation concerns the Alaska National Interest Lands Conservation Act, 16 U.S.C. §§ 3101-3233 (1982) (ANILCA), exclusively. While ANILCA itself, as the statutory protector of irreplaceable resources and the way of life of Alaska rural subsistence users, *see* 16 U.S.C. §§ 3110-3120, embodies elements of concern and interest to amici, amici are most concerned about petitioners' attempt to frame the issues before the Court as encompassing the availability of injunctive relief under "environmental statutes" generally. Amici benefit from laws such as ANILCA, the National Environmental Protect Act (NEPA), 42 U.S.C. §§ 4321-4361 (1982) and the Clean Air Act, 42 U.S.C. §§ 7401-7642 (1982), and are directly affected by the availability of injunctive relief for violations of those statutes.

Petitioners' misreading of ANILCA and their attempt to apply holdings specific to ANILCA section 810 to other environmental statutes directly implicate the interest of amici and form the basis for amici's participation. While amici believe that ANILCA sets the parameters of this case, the petitioners' attempt to expand the case beyond the confines of ANILCA provides the major impetus for the participation of amici.[1]

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1 The State of Alaska, which joins in this brief, of course, considers the issue of the proper injunction standard for an ANILCA section 810 violation of sufficient significance, standing alone, for its participation in this case.

SUMMARY OF ARGUMENT

Upon determining that the Secretary of the Interior, as a matter of strong likelihood, substantially violated the Alaska National Interest Lands Conservation Act (ANILCA) section 810, the district court must decide the appropriate remedy. While courts exercise equitable discretion in forming a remedy, the violated statute both limits and defines the discretionary boundaries. The courts must order relief in light of the objectives of the statute, bearing in mind congressional purpose, policy, and mandate. The courts' equitable discretion applies only to the formulation of remedies; the courts have no discretion to deny a remedy altogether, thereby denying enforcement of a legislative act.

Congress has the power to completely control judicial equitable discretion, and it has the power to guide and limit the exercise of the courts' discretion through its statutory enactments. In determining the appropriate remedy for an ANILCA section 810 violation, the Court must look to ANILCA itself to discern congressional policy and the appropriate parameters of equitable discretion.

ANILCA presents a clear policy for protection of subsistence uses of Alaska rural residents. The statutory provisions apparently violated by the Secretary of the Interior form the sole mechanism for meaningful particiation by Alaska rural subsistence users in the subsistence management process. Failure to follow the ANILCA section 810 procedures skews the entire decision-making process and could seriously jeopardize subsistence uses. Congress's intent is clearly stated in ANILCA itself and in its legislative history: subsistence uses should be protected, and the mechanism codified by ANILCA section 810 represents the only manner congressionally determined as appropriate to

provide that protection. ANILCA section 810 severely limits equitable discretion as part of its protection of subsistence uses.

The Ninth Circuit's standard for issuance of an injunction for an ANILCA section 810 violation properly reflects the limits on discretion imposed by ANILCA. The Ninth Circuit standard imposes a presumption which the Secretary of the Interior must overcome to avoid the injunction. In this manner, the Ninth Circuit is sensitive to Congress's strong policy of protecting subsistence uses, while maintaining its discretion to deny injunctions in unusual cases.

ARGUMENT

I. INTRODUCTION

In *People of the Village of Gambell v. Hodel*, 774 F.2d 1414 (9th Cir. 1985), the Court of Appeals affirmed the District Court's finding that the Villagers of Gambell established a strong likelihood of success on the merits—that the Secretary of the Interior substantially violated section 810 of the Alaska National Interest Lands Conservation Act (ANILCA), 16 U.S.C. § 3120 (1982). 774 F.2d at 1422. Having so determined, the court considered the best method of achieving compliance with ANILCA section 810 in light of Congress's expressly stated policy of protecting the subsistence uses and culture of Alaska rural residents. 16 U.S.C. § 3114 (1982).

Similarly, this Court should reach the question of the propriety of the issuance of an injunction in this case, and

the standard under which an injunction issues for ANILCA section 810 violations generally, only after it determines that the district court and the court of appeals properly found that the Villagers have a strong likelihood of success on the merits. Amici assume in the discussion that follows that the Secretary of the Interior substantially violated ANILCA section 810, and that the Court must decide the proper remedy.

II. ONCE THE COURT DETERMINES THAT, AS A MATTER OF STRONG LIKELIHOOD, THE SECRETARY OF THE INTERIOR VIOLATED ANILCA SECTION 810, ONLY THE QUESTION OF HOW BEST TO ACHIEVE STATUTORY COMPLIANCE REMAINS

A. The Court Must Look to ANILCA to Determine the Parameters of Its Equitable Discretion In Forming an Appropriate Remedy

In *City of Milwaukee v. Illinois*, 451 U.S. 304 (1981), the Court held that Congress preempted the application of federal common law by adopting a comprehensive regulatory scheme, specifically the Federal Water Pollution Control Act, 33 U.S.C. §§ 1151-1376. 451 U.S. at 317. The Court found that the appropriate division of functions between the Judiciary and Congress applies to the courts' ability to form federal common law. 451 U.S. at 312; *see Erie R. Co. v. Tompkins*, 304 U.S. 64, 78 (1938) (federal courts are not courts of general common law). Thus, courts may not "'judicially decree [ ] what accords with "common sense and the public weal"' when Congress has addressed the problem." *City of Milwaukee*, 451 U.S. at 315, *quoting TVA v. Hill*, 437 U.S. 153, 195 (1978).

Congress has left no doubt that, with respect to the federal interest in the public lands of Alaska, ANILCA

occupies the field through a comprehensive regulatory scheme; with respect to the conservation units established by the Act

> "[ANILCA] provides sufficient protection for the national interest in the scenic, natural, cultural and environmental values on the public lands in Alaska, and at the same time provides adequate opportunity for satisfaction of the economic and social needs of the State of Alaska and its people; accordingly, the designation and disposition of the public lands in Alaska pursuant to this Act are found to represent a proper balance between the reservation of national conservation system units and those public lands necessary and appropriate for more intensive use and disposition, and this Congress believes that the need for future legislation designating new conservation system units, new national conservation areas, or new national recreation areas, has been obviated thereby."

16 U.S.C. § 3101(d) (Congressional statement of purpose). ANILCA establishes a preference for subsistence use of fish and wildlife on federal lands. 16 U.S.C. §§ 3114, 3115. ANILCA defines the subsistence uses of rural Alaskans and it determines the protections afforded those uses. 16 U.S.C. §§ 3113, 3114, 3120. Judicial remedies for violation of the subsistence use protection embodied in ANILCA must be consistent with congressional purpose. *See City of Milwaukee,* 451 U.S. at 312 (federal rules in "areas of national concern" are made by Congress—not the courts).

Although *City of Milwaukee* concerns the preemption of federal common law by a comprehensive regulatory scheme, the Court's citation of *TVA v. Hill,* 437 U.S. 153, 194-95 (1978), strongly suggests that a similar analysis applies to the courts' equitable jurisdiction, albeit somewhat

more selectively. *See e.g., Weinberger v. Romero-Barcelo*, 456 U.S. 305 (1982); *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 415-17 (1975) (statutes guide and limit equitable discretion). *City of Milwaukee* and ANILCA's statement of purpose make clear that ANILCA is the only relevant source of law and the only relevant source for determining the appropriate level of discretion (if any) applicable to formation of the remedy with respect to an ANILCA violation.

B. Statutory Violation Requires Statutory Compliance, and Any Remedy Must Be Consistent With the Statute

Assuming that the lower courts properly determined that, in all likelihood, the Secretary of the Interior substantially violated ANILCA section 810, only the question of remedy remains. The Court cannot decide simply to ignore conduct violative of ANILCA section 810; some remedy, both consistent with and in furtherance of ANILCA must be implemented. *See United States v. American Tobacco Co.*, 221 U.S. 106 185 (1910) (discretion of courts bounded by "duty of giving complete and efficacious effect to the prohibition of the statute."); *see also Gilbertville Trucking Co., v. United States*, 371 U.S. 115, 130 (1962). Failure to remedy the statutory violation would defeat congressional mandate and reformulate courts as legislators. *See Osborn v. Bank of United States*, 22 U.S. (9 Wheat.) 738, 866 (1824) ("When [courts] are said to exercise a discretion it is a mere legal discretion, a discretion to be exercised in discerning the course of the law. . . . Judicial power is never exercised for the purpose of giving effect to the will of the Judge; always for purpose of giving effect to the will of the Legislature; or, in other

words, to the will of the law.'') Any ''balancing'' that occurs concerns the appropriateness of a particular remedy, not whether the violation should be remedied. *See Romero-Barcelo,* 456 U.S. at 320 (FWPCA permits the district court to order relief necessary to secure *prompt* compliance with the Act); *Hecht Co. v. Bowles,* 321 U.S. 321, 326 (1944) (because an injunction would have ''no effect by way of insuring better compliance in the future'' it was inappropriate).

Determination of the proper remedy for statutory violation depends on Congress's purposes underlying and defining the statute. *See, e.g., Albemarle,* 422 U.S. at 426; *Hecht,* 321 U.S. at 331 (the court exercises its power ''in light of the large objectives of the Act''). ANILCA and other environmental statutes—particularly in light of the often sensitive nature of the environment itself as well as the decision-making process preceding projects affecting the environment—present cases in which courts must take special care in considering congressional intent in determining remedies for statutory violations. *See* discussion in §§ VI, VII infra.

III. CONGRESS HAS THE AUTHORITY TO LIMIT JUDICIAL EXERCISE OF EQUITABLE DISCRETION

A. The Violated Statute Forms the Limits of the Appropriate Remedy

Congress can, and does, limit judicial equitable discretion. *See, e.g., United States v. Rodgers,* 461 U.S. 677, 709 (1983); *Romero-Barcelo,* 456 U.S. at 320; *TVA v. Hill,* 437 U.S. at 194-95; *Albemarle,* 422 U.S. at 415-17; *Arizona v. California,* 373 U.S. 546, 565-66 (1963); *Hecht,* 321 U.S. at 329. In *TVA v. Hill,* 437 U.S. at 194-95, the Court found

that Congress can remove equitable jurisdiction from courts in its entirety:

> "Congress has spoken in the plainest of words. . . . Once the meaning of an enactment is discerned and its constitutionality determined, the judicial process comes to an end."

Thus, even in the face of what the district court termed an "absurd result," *id.* at 196 (Powell, J. dissenting), the Court could not "preempt congressional action by judically decreeing" a "common sense result." *Id.* at 195. *TVA v. Hill* leaves no doubt that the exercise of congressional power limits judicial equitable remedies, and, at times, forecloses all discretion upon a finding of statutory violation.

In most instances, Congress does not foreclose all judicial equitable discretion. *E.g., Romero-Barcelo,* 456 U.S. at 313 (preclusion of all equitable discretion "not lightly assumed"). However, statutes define and limit the courts' power to formulate remedies. *See, e.g., id., Albemarle,* 422 U.S. at 415-17.

The courts' role in enforcing statutory compliance places the statutory scheme with its congressional purposes and goals along side the courts' equitable powers, with the statute defining and limiting equitable discretion. In fact, the issue of the proper standard by which to evaluate the propriety of injunctive relief in light of the probable statutory violation can usefully be framed as an attempt to determine the proper accomodation between congressional statutory mandate and judicial equitable discretion. *See Id.* The courts' balance of competing interests to determine the appropriate means of compliance with congres-

sional mandate, requires, in essence, a policy decision (albeit a *judicial* policy decision). This is particularly true in cases of violations of environmental statutes. *See* discussion § VI infra. Because the courts engage in balancing, they must have congressional mandate clearly in mind and their discretion must embody statutory dictates.

The Court's cases give guidance as to the proper accomodation of statutory mandate and equitable discretion. In *Albemarle*, 422 U.S. at 405, 415-417, for example, the Court, discussing equitable relief in Title VII cases, stated:

> [S]uch discretionary choices are not left to a court's "inclination, but to its judgment; and its judgment is to be guided by sound legal principles." *United States v. Burr*, 25 F. Cas. 30, 35 (CC Va 1807) (Marshall, C.J.). . . . A court must exercise this power "in light of the large objectives of the Act," *Hecht Co. v. Bowles*, 321 U.S. 321, 331, (1944). That the court's discretion is equitable in nature, *see Curtis v. Loether*, 415 U.S. 189, 197 (1974), hardly means that is is unfettered by meaningful standards or shielded from thorough appellate review. . . . It is true that "[e]quity eschews mechanical rules . . . [and] depends on flexibility." *Holmber v. Armbrecht*, 327 U.S. 392, 396 (1946). But when Congress invokes the Chancellor's conscience to furnish transcedent legislative purposes, what is required is the principled application of standards consistent with those purposes and not "equity [which] varies like the Chancellor's foot." Important national goals would be frustrated by a regime of discretion that "produce[d] different results for breaches of duty in situations that cannot be differentiated in policy." *Moragne v. States Marine Lines*, 398 U.S. 75, 405 (1970).

Similarly, in *United States v. Rodgers*, 461 U.S. 677, 708-09 (1983), the Court found that the federal codifica-

tion of forced judicial sales, 26 U.S.C. § 7403 (1982), allowed "limited equitable discretion" to consider the Government's interests and the interest of innocent third parties. Congress's amendment to the language of section 7403 from "shall decree a sale" to "may decree a sale" persuaded the Court that the statute allowed limited discretion. 461 U.S. at 705-09. *See also Arizona v. California,* 373 U.S. 546, 565-66 (1963) (where Congress has provided its own method for allocating water, courts cannot substitute their own version of equitable apportionment). In *Hecht,* 321 U.S. at 330-31, the court stated that "Court and agency are the means adopted to attain the prescribed end, and so far as their duties are defined by the words of the statute, those words should be construed so as to attain that end through co-ordinated action," and that discretion must be "exercised in light of the large objectives of the Act." The *Hecht* Court found that in that particular case, continuing statutory violation was unlikely and an injunction need not necessarily issue in order to assure compliance with the Act. Statutory language and congressional objective offer the greatest guidance to defining the limits of equitable discretion.

B. The Court in Romero-Barcelo Recognized and Further Defined the Limits of Equitable Discretion

The Solicitor General and the oil companies view *Romero-Barcelo* as a statement of judicial equitable authority to balance statutory *enforcement* against "competing interests." *Romero-Barcelo* contemplates a balance only of remedies: "We read the FWPCA as permitting the exercise of a court's equitable discretion . . . to order re-

lief that will achieve *compliance* with Act." 456 U.S. at 318 (emphasis in original). The issue is how to enforce the statute, not whether to do so. Further, the *Romero-Barcelo* Court recognized that the FWPCA limited the courts' discretion in formulating remedies:

> "We do not read the FWPCA as foreclosing *completely* the exercise of the court's discretion. Rather than requiring a district court to issue an injunction for any and all statutory violations, the FWPCA permits the district court to order that relief it considers necessary to secure prompt compliance with the Act."

456 U.S. at 320 (emphasis added).

The Court concluded that the FWPCA did not completely foreclose equitable discretion only after determining that injunction was not the only means of ensuring statutory compliance, that the congressional objective could be protected by other remedies, and that the district court's consideration of appropriate remedies neither ignored the statutory violation nor undercut the purpose and function of the FWPCA permit system. 456 U.S. at 314-15. Even in light of these conclusions, the Court remanded the case for further consideration of the propriety of the injunction denial. 456 U.S. at 320.

The present case involves a continuing violation of a statute that in no uncertain terms delineates the Secretary of the Interior's duties regarding evaluation of the subsistence uses of Alaska Natives. Following the guidance of *Romero-Barcelo*, determination of the limits of equitable discretion imposed by ANILCA section 810 depends on whether relief other than an injunction can ensure statutory compliance, whether congressional objectives can be

protected by other remedies, and whether other remedies will ignore or undercut the purposes and functions of ANILCA. The subject of the inquiry is ANILCA itself.

IV. ANICLA SEVERELY LIMITS EQUITABLE DISCRETION

A. ANILCA Unambiguously Requires the Secretary of the Interior to Act to Protect the Decision-making Process and the Subsistence Needs of Rural Alaskans

Section 810 of ANILCA, 16 U.S.C. § 3120, the subject of this litigation, states unequivocally the duties of the Secretary of the Interior:

> "In determining whether to withdraw, reserve, lease or otherwise permit the use, occupancy, or disposition of public lands under any provision of law authorizing such actions, the head of the Federal agency having primary jurisdiction over such lands or his designee shall evaluate the effect of such use, occupancy, or disposition on subsistence uses and needs, the availability of other lands for the purposes sought to be achieved, and other alternatives which would reduce or eliminate the use, occupancy, or disposition of public lands needed for subsistence purposes. No such withdrawal, reservation, lease, permit, or other use, occupancy or disposition of such lands which would significantly restrict subsistence uses shall be effected until the head of such Federal agency—
>
> (1) gives notice to appropriate [State and local agencies];
>
> (2) gives notice of, and holds a hearing in the vicinity of the area involved; and
>
> (3) determines that (A) such a significant restriction of subsistence uses is necessary, consistent with sound management principles for the utilization of the public lands, (B) the proposed activity

> will involve the minimal amount of public lands necessary to accomplish the purposes of such use, occupancy, or other disposition, and, (C) reasonable steps will be taken to minimize adverse impacts upon subsistence uses and resources resulting from such actions."

ANILCA section 810, 16 U.S.C. § 3120(a). Subsection (a) of section 810 is entitled "Factors considered, requirements," and states that the Secretary *"shall evaluate,"* leaving no option for the Secretary to follow another procedure or fail to act (emphasis added). Similarly, the statute requires that for *any* land use that significantly restricts subsistence uses, including leases, the Secretary *shall* follow notice and hearing procedures. Subsection (b) requires that the Secretary *shall* provide notice and hearing as part of any environmental impact statement filed pursuant to 42 U.S.C. § 4332(2)(c) (NEPA), for proposed actions under section 810. Congress leaves no doubt that ANILCA, on its face, *requires* that the Secretary follow section 810 procedures *before* allowing leasing of restricted lands for non-subsistence purposes. *Cf. United States v. Rodgers,* 461 U.S. at 705-09 (where Congress substituted "may" for "shall" some judicial discretion can be inferred).

While the language of ANILCA section 810 is clear, Congress also included in Title VIII of ANILCA a Congressional Declaration of Findings, 16 U.S.C. § 3111; a Congressional Statement of Policy, 16 U.S.C. § 3112; and a statement of Preference for Subsistence Uses, 16 U.S.C. § 3114, all of which further reflect the importance of the protection of subsistence uses and Congress' intent strictly to enforce ANILCA: "It is . . . the policy of Congress that . . . utilization of the public lands in Alaska

is to cause the least adverse impact on rural residents who depend upon subsistence uses of the resources of such lands. . . ." 16 U.S.C. § 3112.

"[I]n order to fulfill the policies and purposes of the Alaska Native Claims Settlement Act [43 U.S.C. § 1601 et seq.] and as a matter of equity, it is necessary for Congress to invoke its constitutional authority over Native affairs and its constitutional authority under the property clause and the commerce clause to protect and provide the opportunity for continued subsistence uses on public lands by Native and non-Native rural residents." 16 U.S.C. § 3111(4). With respect to land use decisions, Congress chose to protect and provide for continued subsistence uses through mandatory notice and hearing procedures, to be implemented before the use of any public lands for other than subsistence purposes, including leasing.

In fulfilling its policy that "utilization of public lands in Alaska is to cause the least adverse impact possible on rural residents who depend upon subsistence uses . . .," 16 U.S.C. § 3112, Congress created the mandatory notice and hearing requirements of section 810, requiring the Secretary to analyze and make findings before acting in a manner adverse to subsistence uses. The policy of protection and the mandatory statutory procedure for implementation of the protection form a unit for preservation of subsistence uses.

Determination of appropriate non-subsistence uses of public lands depends entirely on the procedures of section 810. Congress created no other mechanism for consideration of reduction or elimination of subsistence uses. The

procedural mechanism embodies the substantive right. Congress manifested its interest in and concern for subsistence uses and implemented one mandatory system to allow consideration of competing uses. Only through enforcement of the statutory requirements as created can the policy and purpose of ANILCA be properly enforced. The language of the statute creates a legal duty to act in a prescribed manner, without alternative.

B. The Legislative History of ANILCA Further Supports A Strict Reading of the Statute Limiting Remedies for Violation

Representative Udall was the primary author and sponsor of the subsistence provisions of ANILCA. The following statements of Representative Udall make it clear that Congress had every intention of protecting subsistence uses through the requirements of ANILCA:

> "[W]e promised that we would work to try to achieve legislation which would include a subsistence management process to insure meaningful participation by rural people in decisions of both the State and Federal governments which so effect their culture and their lives, and which would provide a mechanism to insure that both State and Federal governments discharge their responsibilities to protect subsistence resources and uses in an adequate and timely fashion."

125 Cong. Rec. 9904 (1979). The comments reflect ANILCA's substantive nature and goals:

> "[R]ural residents and especially Native people expressed concern that their use of fish, wildlife and other wild renewable resources for subsistence must be protected and permitted to continue. . . . It was in response to these concerns [that Title VIII of ANILCA was written]."

Id. Congress recognized high stakes in enacting the subsistence review procedures: "[Subsistence] is a way of life, a unique and endangered way of life that [Title VIII] fully protects. . . ." Id. at 9901. And further:

> "If for any reason . . . the fish stocks and wildlife populations which are the subject of Alaska Native subsistence uses are significantly reduced, either as the result of the degradations of habitat [or other activities], then the Alaska Native Culture as we know it will simply cease to exist."

126 Cong. Rec. 29278. (1980). ANILCA section 810 provides the only mechanisms for subsistence protection in land use decisions such as oil leasing:

> "[Title VIII] contain[s] management provisions which recognize the responsibility of the Federal government to protect the opportunity from generation to generation for the continuation of subsistence use . . . ."

Id.

Congress expressed an awareness of a grave threat to subsistence culture and believed that ANILCA protected rural Alaskans' needs. ANILCA is self-contained; Congress declared its intent to protect subsistence needs exactly in the manner prescribed by ANILCA.

V. BECAUSE ANILCA MANDATES SPECIFIC PROCEDURES, THE SEPARATION OF POWERS DOCTRINE LIMITS EQUITABLE DISCRETION

Once Congress has legislated specific remedies for statutory violations, it, in essence, preempts judicial discretion under the separation of powers doctrine:

> "Our system of government is, after all, a tripartite one, with each Branch having certain defined func-

> tions delegated to it by the Constitution. While '[i]t is emphatically the province and duty of the judicial department to say what the law is,' *Marbury v. Madison,* 5 U.S. (1 Cranch) 137, 177 (1803), it is equally—and emphatically—the exclusive province of the Congress not only to formulate legislative policies, mandate programs and projects, but to establish their relative priority for the Nation. Once Congress, exercising its delegated powers, has decided the order of priorities in a given area, it is for the Executive to administer the laws and for the courts to enforce them. . . ."

TVA v. Hill, 437 U.S. at 194. This is the case even where the result is "absurd." *Id.* at 196 (Powell dissenting); *see Wilderness Society v. Morton,* 479 F.2d 842 (D.C. Cir.), *cert. denied,* 411 U.S. 917 (1973) ("it is an abiding function of the courts . . . to require the Executive to abide by the limitations prescribed by the Legislature"); *see also Osborn v. Bank of United States,* 22 U.S. (9 Wheat.) at 866.

Congress has spoken with respect to subsistence uses: The protection of Alaska rural residents' way-of-life depends on federal action. ANILCA requires procedural integrity. Non-injunctive relief cannot protect the subsistence review process. Section 810 requires that a lease of land affecting subsistences uses be subject to section 810 procedures. The statute creates no option for non-compliance or partial compliance.

VI. CONGRESSIONAL PURPOSE AND THE INTEGRITY OF THE SUBSISTENCE USE ANALYSIS AND HEARING PROCESS UNDER ANILCA CAN BE PROTECTED ONLY BY INJUNCTIVE RELIEF, EXCEPT IN UNUSUAL CIRCUMSTANCES

ANILCA section 810 is designed to influence and control the land use decision-making process from a very

early stage. It is a procedural device with substantative purposes. *See* 16 U.S.C. section 3120(d). As long as the Secretary complies with the statute, public lands under his control can be used as the Secretary sees fit. *Id.* But the statute operates properly—according to Congressional design—if, and only if, the Secretary "compl[ies] with the procedural requirements." 16 U.S.C. § 312(d). Failure of the Secretary to comply with the procedural requirements skews the decision-making process and defeats Congress's policy to evaluate and determine whether a project will "cause the least adverse impact on rural residents who depend upon subsistence uses." 16 U.S.C. § 3112(1). Failure to comply with ANILCA section 810 also defeats Congress's intent to "provide a mechanism to insure . . . protect[ion of] subsistence resources and uses in an adequate and timely fashion." 125 Cong. Rec. 9904 (1979) (comments of Rep. Udall).

Obviously, if the Secretary implements a project affecting subsistence uses without following ANILCA procedures, part of the harm intended to be prevented is suffered and the integrity of the decision-making process destroyed. *See, e.g., Massachusetts v. Watt,* 716 F.2d 946, 952 (1st Cir. 1983) (harm under NEPA occurs when informed environmental consideration is bypassed). Further, the specific function of ANILCA section 810—the protection of subsistence uses—is jeopardized because the decision-maker cannot make informed findings and, ultimately, an informed decision. The Secretary has not heard from the people most knowledgable about subsistence uses. Thus, the statute, the mechanism, the decision-making process, and potentially subsistence uses themselves have been compromised.

In light of the foregoing, the court must form a remedy for the Secretary's failure. The potential harm is catastrophic. 126 Cong. Rec. 29278 (1980) (comments of Rep. Udall) (if subsistence uses are not protected, "Alaska Native Culture as we know it will simply cease to exist"). In light of the presumptions in favor of subsistence uses, and Congress's expressed concern, it is difficult to imagine a situation in which any hardship could outweigh the need to enforce the mechanism protecting subsistence uses. In very unusual circumstances, the delay caused by evaluation of the effect on subsistence uses of some federal action could adversely affect subsistence uses. *Cf. Alpine Lakes Protection Society v. Schlapfer,* 518 F.2d 1089 (9th Cir. 1975) (delay for EIS under NEPA could cause insect infestation and forest loss).

If the court allows a project to continue without the proper subsistence use evaluation, the decision-making process is compromised and the threat to subsistence use becomes, potentially, much more immediate. The further along a project progresses, the greater the stake, both financially and institutionally. *See Massachusetts v. Watt,* 716 F.2d at 953.

The injunction is an extension of congressional intent in the section 810 situation. Nothing else will ensure statutory compliance. Unlike the situation in *Romero-Barcelo,* 456 U.S. at 314, where the Navy could obtain a permit under the FWPCA without distorting the decision-making process, here failure to follow ANILCA procedures precludes future compliance with the mechanism of section 810. Con-

gress has spoken emphatically in favor of subsistence uses and, in doing so, has severely limited remedial relief.[2]

VII. THE NINTH CIRCUIT STANDARD APPLIED IN THIS CASE REFLECTS CONGRESSIONAL LIMITS ON EQUITABLE RELIEF WHILE ALLOWING A SIGNIFICANT AND STATUTORILY APPROPRIATE LEVEL OF DISCRETION

In *People of the Village of Gambell v. Hodel*, 774 F.2d 1414 (9th Cir. 1985), the Ninth Circuit first affirmed the district court's finding that the Villagers showed a strong likelihood of success on the merits. *Id.* at 1422. The court then balanced the irreparable harms in determining the propriety of injunctive relief to maintain the status quo in light of the probable statutory violation. *Id.* at 1422-26. In doing so, the court applied a presumption to the equation which placed the burden on the probable statute-violator to show the inappropriateness of an injunction. *Id.* at 1422-23. The Secretary in *Gambell* failed to meet his burden and the Ninth Circuit issued the injunction. *Id.* at 1426.

The burden applied in *Gambell* is a heavy one: the probable statute-violator must show rare or unusual circumstances to convince the court that the statutory viola-

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2 The Solicitor General agrues that compliance with ANILCA could occur at the later "development and production" stage without prejudice because the "lease" stage is not a threat to subsistence uses. Federal Petitioner's Brief at 14. Congress, however, determined that a lease of land requires that the ANILCA section 810 procedure be followed. 16 U.S.C. § 3120. Only if the Secretary considers subsistence prior to leasing can he properly consider "the availability of other lands for the purposes sought to be achieved" with subsistence uses in mind —as required by section 810. Congress has specified use of the procedure at the time of the lease. The Secretary has no option to do the procedure at some other time.

tion should be allowed to continue unremedied and that an injunction should not issue. The burden applied by the Ninth Circuit appropriately accounts for the emphatic congressional policy of protecting subsistence uses and the operation of the sole—and exclusive—statutory method for determining priorities where an action affects subsistence uses. At the same time, the Ninth Circuit rule does not foreclose discretion in the rare or unusual case in which congressional purpose and intent would be defeated by the grant of an injunction.

First, the Ninth Circuit standard applied in *Gambell* is not a "per se rule"—it does not *require* that an injunction automatically issue upon a showing of statutory violation or probable statutory violation. In three published NEPA cases, the Ninth Circuit has applied the same injunction standard applied in *Gambell* under ANILCA and determined that, on balance, the unusual circumstances outweigh the presumption in favor of injunctive relief.

In *American Motorcyclist v. Watt*, 714 F.2d 926, 966 (9th Cir. 1983), the court determined that "public concerns other than the failure to comply with NEPA must be weighed in determining whether to grant an injunction." The court in *American Motorcyclist*, citing *Romero-Barcelo*, denied the injunction for fear of resultant permanent damage to fragile desert resources after determining that the district court properly engaged in the "required weighing" and consideration of the public interest. *Id.* at 966-67. Similarly, in *Alpine Lakes Protection Society v. Schlapfer*, 518 F.2d 1089, 1090 (9th Cir. 1975), the Ninth Circuit denied a NEPA injunction because it would lead to timber damage and insect infestation, a harm which the court found outweighed the possible reduction of the area's wilderness characteristics. In *Forelaws on Board v. Johnson*, 743 F.2d

677, 688 (9th Cir. 1984), the court denied an injunction as inappropriate in light of disruption of long-term contracts entered into pursuant to another federal act that mandated their implementation with "a certain amount of urgency." *See also Steamboaters v. FERC,* 777 F.2d 1384, 1385-86 (9th Cir. 1985) (presumption of harm from NEPA violatoon outweighed "public interest in promoting small hydropower projects"); *Save Our Ecosystems v. Clark,* 747 F.2d 1240, 1250 (9th Cir. 1984) (presumption outweighed defendant's showing). Obviously, the Ninth Circuit standard applied in the *Gambell* case to a violation of ANILCA section 810 is not a "per se" injunction rule.

The Ninth Circuit standard allows the statute violator or probable violator to overcome the injunction presumption. Appropriately, the burden on the violator is high. The burden reflects ANILCA's protection of subsistence uses and Congress's choice of the decision-making process while allowing the courts to exercise their historical equitable discretion to achieve compliance with the purposes of the Act as well as the letter of the statute. *E.g., Romero-Barcelo,* 456 U.S. at 314.

Applying the Ninth Circuit standard to factual situations in *Hecht* and *Romero-Barcelo* would allow the court to reach the appropriate results. In *Hecht,* 321 U.S. at 326, the Court determined that an injunction would not further compliance. *See* Plater, Statutory Violations and Equitable Discretion, 70 Cal.L.Rev. 524, 546-53 (1982). *Hecht* involved a remedy only for past violations. Such a situation, particularly one involving a violation of ANILCA or NEPA, *see* discussion in section VI supra, would undoubtedly rise to the level of unusual circumstances. It is difficult to imagine an ANILCA section 810 violation that had only retrospec-

tive effect, but in the face of such a situation, the Ninth Circuit's standard certainly would account for it in its balance.

In *Romero-Barcelo,* the Court, reviewing the navy's release of ordnance from aircraft into navigable waters as the basis for an injunction under the FWPCA, 33 U.S.C. §§ 1251-1376 (1982), pointed to the district court's determination that (1) the Navy's control of the release area probably constituted a positive factor in the area's ecology, and (2) because of the Navy's important training functions, injunctive relief would cause grievous harms to the welfare of the Navy and the nation. 456 U.S. at 310 & n. 4. The Court also determined that the Navy's action "neither ignored the statutory violation nor undercut the purpose and function of the permit system." *Id.* at 315. The Ninth Circuit's formulation envisions consideration of exactly such factors. *See Forelaws on Board,* 743 F.2d at 966, *Alpine Lakes Protection Society,* 518 F.2d at 1090; *see also Steamboater v. FERC,* 777 F.2d at 1385-86. Similar findings under ANILCA are very unlikely, but, again, would present unusual circumstances for balance under the Ninth Circuit standard.

Congress severely limited judicial equitable discretion by enacting the strict requirements of ANILCA section 810 and instituted protection of the subsistence needs and uses of rural Alaskans through a well-defined mechanism. The Ninth Circuit standard applied in *Gambell* is sensitive both to the congressional mandate and legislated presumption and to the possibility of unusual circumstances which require discretion and nuance in formulating remedies to achieve compliance in an equitable manner. As such, the Ninth Circuit standard applied in *Gambell* consistently fol-

lows the teachings of *Romero-Barcelo, TVA v. Hill,* and *Hecht.*

VIII. CONSIDERATION OF THE APPROPRIATE INJUNCTION STANDARD IN NEPA CASES IS IRRELEVANT TO THIS LITIGATION

The Solicitor General and the oil companies attack the Ninth Circuit's use of its injunction standard in "environmental" cases. ANILCA section 810, not "environmental statutes," is the subject of this litigation. Because Congress through its legislative process determines the extent of judicial equitable discretion, see e.g., *Hecht,* 321 U.S. at 331, only ANILCA gives guidance with respect to the appropriate standard under which injunctive relief should be granted. The standard applicable for violations of other environmental statutes cases depends on the wording of those statutes and a full review of the statute's legislative history—an inquiry inappropriate in this ANILCA section 810 case.

The Solicitor General's brief best illustrates the need for a statute-specific inquiry. While the Solicitor frames the question on certiorari as whether an injunction should issue for a likely violation of "an environmental statute," he is forced repeatedly to return to the text of ANILCA to argue the propriety of the injunction in this case. *E.g.* Federal Petitioners Brief at 21-22, 22, 23, 24, 25. The Solicitor's analysis of ANILCA gives no guidance for injunctive issuance standards under other statutes, other than to underline the need to review each statute separately.

Only ANILCA is relevant to the specific consideration of hardship factors in this case. The Ninth Circuit properly applied a presumption in favor of injunctive relief

for an ANILCA section 810 violation that reflects congressional intent while allowing sufficient discretion to deal appropriately with unforseeable cases.

Congress requires that Alaskan rural residents receive the opportunity to enter the decision-making process from the beginning. Congress determined the sole process by which Alaska rural residents' interests can be heard and considered. When the Secretary fails to follow the mandated procedures, decision-making is distorted and the natives' interests lose protection. The Secretary can decide appropriate land uses only according to the legal mechanism. Injunctive relief protects the intergrity of the process.

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IX. CONCLUSION

For the foregoing reasons, amici submit that the decision of the Ninth Circuit should be affirmed.

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